



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 2, 2003

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-0040

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#174404.

The Texas Department of Transportation (the "department") received two requests for information pertaining to job vacancy notice number 002660. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, 552.122, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of information submitted to this office.¹

Initially, we note that you only seek a decision from this office regarding the submitted interview questions, answers, and preferred answers, as well as selected information on the job applications. Therefore, we assume that you have released any remaining responsive information to the requestors. If you have not released any such information, you must release it to the requestors at this time. *See* Gov't Code §§ 552.301(a), .302.

Section 552.117(1) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the employee has family members, if the current or former employee timely requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). This information may not be withheld, however, in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, the submitted documentation demonstrates that there are applicants who are current department employees. Therefore, for the department employees who made timely elections under section 552.024, you must withhold the personal information that you have marked, and the additional information that we have marked, under section 552.117.

We note that social security numbers that are not otherwise excepted from disclosure under section 552.117 might nevertheless be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You inform us that the department maintains employees' social security numbers pursuant to provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(a)(2)(B), (b)(1)(A).² Under this federal law, an employer is required to furnish to the Directory of New Hires of the State in which a newly hired employee works, a report that includes the employee's social security number. 42 U.S.C. § 653a(b)(1)(A). Thus, we agree that the department must withhold from disclosure the social security numbers of department employees whose numbers were collected pursuant to this law. For employees who were hired before this law was enacted, social security numbers were not obtained or maintained pursuant to the law and therefore, those numbers may not be withheld under section 552.101 and the federal law. We also have no basis for concluding that any of the social security numbers of the applicants that were not selected and who are not otherwise department employees are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

We will next address your argument under section 552.122. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122

² Although you also note that section 158.203 of the Family Code constitutes a statute enacted after October 1, 1990 that requires the collection of certain employees' social security numbers, you have not argued that this provision of law is in fact applicable in this instance. Accordingly, we do not address the applicability of section 158.203 in this instance.

exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You contend that interview questions numbered 1, 2b, and 8 from job posting number 002660 are excepted from disclosure under section 552.122(b) of the Government Code. After reviewing the submitted information, we agree that these questions constitute standard means by which an individual's or group's knowledge or ability in a particular area is evaluated. Because the applicants' answers and the preferred answers to those questions may reveal the substance of the questions, we conclude that the department may withhold interview questions numbered 1, 2b, and 8, along with the corresponding applicants' and preferred answers pursuant to section 552.122(b).

Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The Texas driver's license information that you have marked must be withheld under section 552.130.

Section 552.137 of the Government Code, which makes certain e-mail addresses confidential, provides in relevant part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

You do not inform this office that any of the individuals who provided the e-mail addresses in the submitted documents to the department have affirmatively consented to their release. Therefore, the department must withhold the e-mail addresses that you have marked, and the additional addresses that we have marked, under section 552.137 of the Government Code.³

Lastly, we note that section 552.023 of the Government Code gives a person a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. As sections 552.101, 552.117, 552.130, and 552.137 are laws intended to protect a person's privacy interest, and one of the

³The identical exception has been added as section 552.136 of the Government Code.

requestors is a person whose privacy interest the department seeks to protect, you may not withhold from Antonio Tijerina the marked information relating to Mr. Tijerina under sections 552.101, 552.117, 552.130, and 552.137. Therefore, the department must release to Mr. Tijerina his own social security number, personal information, motor vehicle information, and e-mail address.

In summary, the department must withhold under section 552.117 department employees' home addresses, home telephone numbers, social security numbers, and information that reveals whether each employee has family members, but only to the extent the employees timely elected to keep this information confidential in accordance with section 552.024 of the Government Code. For social security numbers not so excepted, you must withhold this information for employees whose social security numbers were collected pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The department must also withhold from the submitted information the marked Texas driver's license information under section 552.130, as well as the marked personal e-mail addresses, unless the department receives an affirmative consent to release from the person to whom the e-mail address belongs, under section 552.137. The department may withhold interview questions numbered 1, 2b, and 8, along with the corresponding applicants' and preferred answers pursuant to section 552.122(b). Lastly, the department must release to Mr. Tijerina his own social security number, personal information, motor vehicle information, and e-mail address. The remaining submitted information must be released to both requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 174404

Enc: Submitted documents

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